No. ------

IN THE SUPREME COURT OF THE UNITED STATES

October Term. 1967

KENNETH DALE RAHRIG,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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To The Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

The Petition of Rahrig for a Writ of Certiorari to review an Order of The Court of Appeals for the Sixth Circuit entered November 17, 1967, respectfully shows:

OPINIONS BELOW

The Orders of the Court of Appeals are not reported, and are annexed hereto as Appendix I.

A copy of the relevant Order of the District Court is annexed hereto as Appendix II.

GROUNDS UPON WHICH JURISDICTION IS INVOKED

The jurisdiction of this Court is invoked under Section 1254 (1), Title 28, United States Code, and Rule 19 (1) (b), U.S. Supreme Court Rules.

CONSTITUTIONAL QUESTION PRESENTED FOR REVIEW

The fundamental question presented by this Petition is whether the Order of the Court of Appeals dismissing Rahrig's appeal is a denial of due process of law guaranteed to Rahrig by Amendment V of the Constitution of the United States of America.

CONSTITUTIONAL PROVISION INVOLVED

Amendment V of the United States Constitution:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

* * *

STATEMENT OF THE CASE

Rahrig seeks a review of the Sixth Court of Appeals order denying his motion (1) to set aside its order dismissing his appeal as untimely and (2)to enter an order Appointing Counsel for Rahrig to perfect his appeal nunc pro tunc.

The record on appeal and transcript of proceedings are on file with the Court.

ARGUMENT

On March 23, 1967, Howard T. Ziel, Clerk of the United States District Court for the Western District of Michigan, noticed the Appeal of Rahrig from his conviction after trial for unlawful possession of a still, and also for fermenting mash contrary to law. On March 29, 1967, Rahrig was authorized by Judge W. Wallace Kent of said Court to pursue his Appeal in FORMA PAUPERIS, a copy of which order is annexed hereto as Appendix II.

After conviction, Rahrig, the order IN FORMA PAUPERIS in hand, was left to his own devices to prepare and perfect a timely appeal.

Said Order provided that a transcript of the trial and all other proceedings be furnished to Rahrig at government expense, which Rahrig expected to receive before filing a brief and which Rahrig to date has never seen or received.

On June 21, 1967, the record was certified and docketed in the Court of Appeals, Clerk Carl W. Reuss notifying Rahrig the same day and requesting Rahrig to file a Motion for Appointment of Counsel. Rahrig, appealing in FORMA PAUPERIS and awaiting his "transcript of the record" did not understand a time element for his appeal was involved, and misconstrued the request to move for counsel believing from what he thought Judge Kent told him the Court of Appeals would initiate the appointment without any motion.

After the passage of 90 days, on September 21, 1967, Clerk Carl W. Reuss again wrote Rahrig asking Rahrig to notify him by return mail if the Appeal had been abandoned. On September 25, 1967, Rahrig called the Clerk and also wrote two letters stating he had not abandoned the Appeal and asked for guidance to perfect his Appeal. On the same day, U.S. District Attorney Harold D. Beaton moved to dismiss the appeal, and, on October 7, 1967, the Court of Appeals reciting that no Motion for Counsel was made and no brief filed, dismissed the Appeal pursuant to Court of Appeals Rule 16 (12). The Court subsequently denied Rahrig's personal request for reconsideration and this counsel's Motion to Set Aside the Order Dismissing the Appeal.

As indicated to the Court of Appeals, the preparation, certification and docketing of a transcript of the record on Appeal in this case is a useless waste of public funds and a sterile, ministerial waste of time, while a FORMA PAUPERIS Defendant-Appellant, whom that Court knew or ought to know is ignorant of procedure, waits in the wings of their judicial theater for "his transcript" so he can

state (brief) his case, and the sands of his appeal time run out.

Under these circumstances, the Court of Appeals peremptory dismissal of said Appeal pursuant to the rule is a denial of due process of law guaranteed to Rahrig by Amendment V of the Constitution of the United States of America.

CONCLUSION

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari to review an order of the Court of Appeals for the Sixth Circuit be granted.

December 15, 1967.

EDWARD CAMPBELL FARMER, JR.,
Attorney for Petitioner

Business Address:
500 Nat'l Lumberman's Bank Bldg.,
Muskegon, Michigan 49440

APPENDIX I

No. 18,000

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

KENNETH DALE RAHRIG,
Defendant-Appellant.

ORDER
(Filed Oct. 7, 1967)

Before: CELEBREZZE, PECK and COMBS, Circuit Judges.

Appellant, Kenneth Dale Rahrig, was convicted in the United States District Court for the Western District of Michigan for unlawful possession of a still, and also for fermenting mash contrary to law.

March 20, 1967, he was sentenced to serve ninety days in the Muskegon County Jail, Muskegon, Michigan, on one count and to three years' probation on the other count. He filed notice of appeal to this Court on March 23, and the District Court authorized him to appeal in forma pauperis on March 29.

On June 21, the record of appeal was filed in this Court and the appeal was docketed. Also on June 21, the Clerk of this Court advised appellant of his right to court appointed counsel and suggested that, if he desired such counsel, a motion for same should be filed. No motion for appointment of counsel has been filed and no brief has been filed.

On September 25, the United States Attorney filed motion to dismiss the appeal. September 27, the Clerk of this Court received two letters from appellant objecting to dismissal of the appeal and requesting the Clerk to "let me know the things necessary for me to do so that I can continue this."

Appellant has served no part of his sentence of imprisonment, and it would appear that he has attempted to continue this appeal for the purpose of delay only.

The appeal is dismissed pursuant to the Rules of this Court, Rule 16(12).

Entered by order of the Court:

(s) Carl W. Reuss
Clerk

No. 18,000

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

KENNETH DALE RAHRIG,
Defendant-Appellant.

ORDER
(Filed Oct. 20, 1967)

Before: CELEBREZZE, PECK and COMBS, Circuit Judges.

Appellant's "Motion for Reconsideration" of the order dismissing the appeal herein is denied.

Entered by order of the Court:

(s) Carl W. Reuss
Clerk

No. 18,000

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

KENNETH DALE RAHRIG,
Defendant-Appellant.

ORDER
(Filed Nov. 17, 1967)

Before: CELEBREZZE, PECK and COMBS, Circuit Judges.

Upon consideration, IT IS ORDERED:

1. The motion to set aside the order dismissing appellant's appeal herein is denied.

2. The motion to stay execution of sentence and to continue bail is denied.

Entered by order of the Court:

(s) Carl W. Reuss
Clerk

APPENDIX II

UNITED STATES OF AMERICA IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DIVISION OF MICHIGAN, SOUTHERN DIVISION

UNITED STATES OF AMERICA,

vs. Criminal No. 7316

KENNETH DALE RAHRIG,

The above named defendant having filed an application for authority to appeal in forma pauperis and having attached thereto a schedule of assets and liabilities and it appearing to the satisfaction of the court that the petitioner is without funds to pursue the prosecution of the appeal, that is without funds to pay for a transcript of the proceedings, and that he is without funds with which to employ counsel to prosecute such appeal.

Now, therefore, IT IS ORDERED that the said defendant, Kenneth Dale Rahrig, is hereby authorized to pursue his appeal in forma pauperis;

IT IS FURTHER ORDERED that a transcript of the trial and all other proceedings in connection with such case shall be furnished to the said Kenneth Dale Rahrig at the expense of the Government.

It appearing to the satisfaction of the court that the appointment of counsel on appeal is a matter vested in the discretion of the United States Court of Appeals for the Sixth Circuit.

IT IS ORDERED that a copy of such affidavit, schedule of assets and liabilities, and a copy of this order be forwarded to the United States Court of Appeals for the Sixth Circuit.

Dated: March 29, 1967.

W. WALLACE KENT
Circuit Judge

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FILED
MAR 11 1968
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1967

KENNETH DALE RAHRIG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

FRED M. VINSON, JR.,
Assistant Attorney General,

BEATRICE ROSENBERG,
LAWRENCE P. COHEN,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 989

KENNETH DALE RAHRIG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted in the United States District Court for the Western District of Michigan on two counts charging the unlawful possession of a still, in violation of 26 U.S.C. 5601(a)(1), and the fermentation of mash, in violation of 26 U.S.C. 5601 (a)(7). On March 20, 1967, he was sentenced on the possession count to 90 days imprisonment at the Muskegon County Jail, with permission to leave every work day between the hours of 6:00 a.m. to 4:00

p.m.; he was placed on probation for three years on the other count (R. 13-13A). On October 7, 1967, his appeal was dismissed by the court below for failure to file briefs within the prescribed time (Pet. App. I.5-6). A "Motion for Reconsideration" was denied on October 20, 1967 (Pet. App. I.6). His petition for a writ of certiorari was not filed until January 5, 1968, and is, thus, long out of time under Rule 22(2) of the Rules of this Court. There is in any event no occasion for further review.

Petitioner's notice of appeal was filed by the Clerk on March 23, 1967 (R. 15). Thereafter, petitioner filed a motion in the district court for appointment of counsel [1] and for a transcript of the proceedings (R. 17). On March 29, 1967, the district court granted petitioner's motion to appeal in forma pauperis, but told him that application for appointment of counsel should be made in the court of appeals (R. 18, 19). The appeal was docketed in the court of appeals on June 21, 1967. On that same date, the Clerk of the court of appeals advised petitioner that if he desired appointment of counsel, a motion for appointment should be filed with the Clerk.[2] No such motion was made for three months. When petitioner was told that the government moved to dismiss the appeal, petitioner replied that he had been unaware of the fact that he had to apply in the court of appeals for appointment of counsel (R. 28, 29). He then requested

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[1] Petitioner was represented by retained counsel at trial.

[2] We are lodging a copy of the letter to petitioner with the Clerk of this Court.

a further continuance. Two weeks then passed without any motion being filed by petitioner. Only then did the court below dismiss the appeal.

In the circumstances, the court below reasonably concluded that petitioner, who has served no part of his sentence, "attempted to continue this appeal for the purpose of delay only" (Pet. App. I.6) and properly dismissed the appeal. Petitioner completely ignored the clear and precise instruction from the Clerk regarding the filing of a motion for appointment of counsel. Even when told on September 25 that the government had moved for dismissal of the appeal, petitioner took no action to comply with the instructions of the Clerk.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
LAWRENCE P. COHEN,
Attorneys.

MARCH 1968.

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